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September 28, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 9, 2006

Case Number: TSO-0396

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that access authorization should not be restored in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concern.

The letter states that the individual indicated on a July 16, 2004 Questionnaire for National Security Positions (QNSP) that he had not used or purchased illegal drugs in the past seven years and

¹/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

that he never used a controlled substance while in possession of a security clearance. However, during a February 3, 2006 personnel security interview (PSI), he admitted that he used and purchased cocaine and heroin from October 1999 to December 1999, while possessing a DOE access authorization. This represents a concern under 10 C.F.R. § 710.8(f) (Criterion F) which relates to falsification.

Further, the notification letter indicates that the individual abused his prescription medication, Lomotil, from approximately 1995 through 2000 and ordered 400 to 800 pills of Lomotil from Mexico to supplement his addiction. According to the notification letter the individual also purchased Valium and Ambien or Restoril from Mexico without a prescription. In addition, the notification letter states that the individual purchased cocaine, crack cocaine and heroin from October to December 1999. This is a concern under 10 C.F.R. § 710.8(k)(Criterion K) which pertains to illegal use of drugs. ²

The letter also noted that on November 6, 1992, the individual signed a DOE drug certification promising that he would not use or be involved with illegal drugs while in possession of a DOE security clearance. His use of cocaine, heroin and crack cocaine from October 1999 to December 1999 violated that promise and gives rise to a security concern under 10 C.F.R. § 710.8(l)(Criterion L), which pertains to reliability and trustworthiness, and specifically to any violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility. ³

2/ Criterion K includes information that the individual has "used. . . a drug. . . listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as. . . cocaine. . .) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine or as otherwise authorized by Federal law."

3/ Criterion L includes information that an individual engaged in "any unusual conduct or is subject to any circumstances which tend to show that an individual is not honest, reliable or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation or duress which may cause the individual to act contrary to
(continued...)

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the derogatory information. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual testified on his own behalf, and presented the testimony of his fiancée, his Narcotics Anonymous (NA) sponsor and spiritual advisor, his supervisor, two friends, and his former therapist. The DOE counsel did not present any witnesses.

II. Hearing Testimony

A. The Individual

With respect to his use of illegal drugs, the individual has indicated that he has been drug-free since the year 2000. He testified that his last use of Lomotil was in July 2000. Tr. at 169. The individual related that he had received therapy from an inpatient treatment center. Tr. at 154. A letter from that treatment center dated September 6, 2006, confirms that he participated in that program from August 4, 2000 through September 1, 2000, and the treatment was successful. The individual states that his NA "clean date" was September 21, 2000. Submission of April 24, 2006.

He believes that he now has a solid approach for dealing with stress that might previously have caused him to turn to drugs: he uses spirituality, exercise, and turns to his fiancée and NA friends for support. Tr. at 144, 146, 162, 164.

Regarding his falsification on the 2004 QNSP, the individual stated that he did so out of fear of losing his job. He testified that through his counseling, he has been able to give up the fear, and that is what enabled him to reveal the falsification in the 2006 PSI. He testified that the insight he gained from his counseling, combined with all the therapy work he has had in the past five years have enabled him to be more truthful, even if there is a likelihood of adverse consequences. Tr. at 156, 158, 159, 160.

3/ (...continued)
the best interests of the national security."

B. The NA Sponsor

The NA sponsor indicated that he is a licensed alcohol and abuse counselor and a spiritual counselor. The NA sponsor stated that he has known the individual for about five and one half years. Tr. at 117. He indicated that the individual is serious about NA, and has changed his outlook. He states that the individual is active in meetings. He firmly believes that the individual no longer uses illegal drugs. He sees him weekly in counseling for about one to one and one half hours. Tr. at 134-38.

C. The Fiancee

The individual's fiancée stated that she has known the individual since December 2000. She believes that he is trustworthy and testified that he has been truthful about his use of illegal drugs since the time they met. She indicated that the individual told her that he had stopped using illegal drugs several months before they met. She stated that he currently deals with adversity and stress through spirituality, exercise and NA. She is convinced that he has not used illegal drugs since 2000, and that if he were, she would detect it by a personality change. She confirmed that he attends NA meetings at least twice a week. Although she was aware of his illegal drug use, the individual did not tell her of the QNSP falsification until about one month before the hearing. Tr. at 11-28.

D. Friends

The individual's two friends stated that they have known him for several years. Tr. at 35, 48. One of the friends car-pooled with the individual from 1997 through 2000, and the other is a current car-pooler. Tr. at 40, 48. The former car-pooler stated that he did not know that the individual was using drugs, but did realize that the individual was unusually "exuberant" when they drove to work. After the individual stopped using drugs, this witness stated that the individual changed and seemed more normal. He related that the individual discussed his illegal drug use and his treatment at the inpatient treatment center. He believes that the individual is a truthful person. At present, he and the individual see each other occasionally. Tr. at 48-55.

The friend with whom he currently car-pools sees the individual every work day, and once a month on the weekend. Tr. at 40. This friend testified that he learned about the individual's drug use about eight or nine months prior to the hearing. He believes the

individual is honest. He believes that the individual is committed to his recovery, and that the individual has told him that NA is a help to him. He testified that the individual deals with stress through exercise, NA meetings and counseling. He believes that the individual is currently stable. Tr. at 34-42.

E. Supervisor

The individual's supervisor stated that he and the individual have worked together for 15 years and that he has been the individual's supervisor for 10 years. He testified that the individual is a conscientious worker and a good performer. He does not believe that the individual is currently using illegal drugs. The individual has spoken to him about NA and his sponsor. The individual has also told him about his coping mechanisms to deal with stress through NA and exercises. The supervisor learned about the individual's dependence on prescription drugs in the year 2000. However, he did not learn of the illegal drug use until one month before the hearing. He was not aware of the falsification on the QNSP until the matter was revealed to him at the hearing. However, all in all, the supervisor believes that the individual will be truthful in the future and thinks he has "learned his lesson" about honesty. Tr. at 98-112.

F. Individual's Former Therapist

This witness is a psychotherapist and licensed alcohol and drug counselor. The individual was referred to him in 2001 for assistance in his drug addiction. He counseled the individual during the period March 2001 through May 2005 for one to two hours a week. He believes that the individual will not use illegal drugs again and that the individual has a "very good" prognosis. He indicated that by the end of the treatment period the individual had appropriate coping mechanisms for dealing with stress. He stated that he worked with the individual on truthfulness issues. Tr. at 74-94.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his

eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

Criterion K

As is evident from the testimony above, this individual has provided very convincing evidence that he has not used illegal drugs since 2000. His witnesses confirmed this, and the individual himself spoke persuasively about his commitment to a drug-free life style. The individual testified that through exercise, faith, and his strong personal support system, he has learned to deal with the stress that might previously have caused him to turn to use of drugs for relief. His witnesses corroborated that he does indeed have appropriate outlets to cope with stress. I am persuaded that the individual is committed to refraining from illegal drug use in the future. In view of the foregoing, I find that the individual has resolved the Criterion K security concerns in this case.

Criteria F and L

As stated above, there is a Criterion F concern in this case involving the individual's falsification of a 2004 QNSP. In that Questionnaire, he indicated that he had not used or purchased illegal drugs in the previous seven years and that he never used a controlled substance while in possession of a security clearance. In a February 2006 PSI, the individual stated that this was not true. He admitted that he used and purchased cocaine, crack cocaine and heroin from October 1999 to December 1999, while possessing a DOE access authorization. Therefore, I must consider whether the individual has resolved this concern regarding his falsification. As discussed below, I do not find that the concern has been resolved at this time.

As indicated in the testimony above, the individual has recently been giving a great deal of thought and attention to the matter of his personal honesty. I believe that his NA sponsor has confirmed that he is working with the individual to give up his fears associated with the consequences of truthfulness. Through his intensive counseling with his NA sponsor the individual has become deeply introspective about the need for honesty. Thus, I believe that his credibility is on the mend.

However, as of the time of the hearing, he had only been fully honest with the DOE for about six months. Further, the individual did not fully disclose all the facts surrounding the falsification and the drug use itself to his supervisor until shortly before the hearing, or at the hearing itself. There was a similar failure to fully disclose to his fiancée some critical matters regarding his falsification. I am convinced that as of the time of the hearing the individual was earnestly trying to be as candid as possible. However, I am not persuaded that this relatively short six-month period of honesty is sufficient for me to conclude that his commitment to candor has fully taken root. *Personnel Security Review* (Case No. VSA-0384), 28 DOE ¶ 83,201 (2001). For similar reasons, I find that the individual has not resolved the Criterion L reliability concerns associated with his violation of his 1992 drug certification statement.

V. CONCLUSION

As the foregoing indicates, I am persuaded that the individual has resolved the Criterion K security concerns cited in the notification letter. However, I do not believe he has resolved the Criteria F and L concerns. It is therefore my decision that his access authorization should not be restored.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: September 28, 2006